

STATE OF MICHIGAN
COURT OF APPEALS

In re NMW, Minor.

NMW,

Appellee,

and

MICHIGAN CHILDRENS INSTITUTE,

Respondent-Appellee,

v

RITA PORTER and DERICK PORTER,

Petitioners-Appellants.

UNPUBLISHED

October 13, 2009

No. 292356

Ingham Juvenile Division

LC No. 09-000053-AF

Before: Talbot, P.J., and Wilder and M. J. Kelly, JJ.

PER CURIAM.

Petitioners, Rita and Derrick Porter, appeal as of right the circuit court order denying their petition to adopt the minor child pursuant to MCL 710.45. We affirm.

Following birth, the minor child was removed from parental custody and placed in foster care. Shortly thereafter, the child was placed in the home of Rita Porter, a cousin of the child's biological mother. Reportedly, this placement was intended to be temporary, pending the initiation of adoption proceedings by another relative of the child, Diane Wesley.¹ The parental rights of the child's biological mother were terminated on January 31, 2007. Subsequently, the Porters petitioned respondent, Michigan Children's Institute (MCI), to adopt the child. Consent to adopt must be provided by the MCI superintendent, William Johnson. An investigation was conducted that included the participation of the Michigan Indian Child Welfare Agency

¹ Wesley previously adopted an older sibling of the child who is the subject of this petition.

(MICWA), which submitted recommendations that were not favorable to petitioners. Ultimately, MCI denied the Porters' adoption petition. The Porters' challenged the decision of the MCI superintendent in the trial court. A hearing was conducted in accordance with MCL 710.45, which provides, in relevant part:

(7) Unless the petitioner establishes by clear and convincing evidence that the decision to withhold consent was arbitrary and capricious, the court shall deny the motion . . . and dismiss the petition to adopt.

(8) If the court finds by clear and convincing evidence that the decision to withhold consent was arbitrary and capricious, the court shall issue a written decision and may terminate the rights of the appropriate court, child placing agency, or department and may enter further orders . . . as the court considers appropriate.

The trial court affirmed the decision of MCI to deny the petition and this appeal ensued.

In accordance with *In re Keast*, 278 Mich App 415, 423; 750 NW2d 643 (2008), this Court has delineated the standard of review with regard to an adoption petition filed pursuant to MCL 710.45, stating in relevant part:

[A] family court's review of the superintendent's decision to withhold consent to adopt a state ward is limited to determining whether the adoption petitioner has established clear and convincing evidence that the MCI superintendent's withholding of consent was arbitrary and capricious. Whether the family court properly applied this standard is a question of law reviewed for clear legal error. *Fletcher v Fletcher*, 447 Mich 871, 877; 526 NW2d 889 (1994).

As stated in *Keast*, citing to *In re Cotton*, 208 Mich App 180, 184; 526 NW2d 601 (1994):

[T]he family court is not permitted to decide the adoption issue de novo, but rather must determine whether there is clear and convincing evidence that the decision maker acted arbitrarily and capriciously. The generally accepted meaning of "arbitrary" is " 'determined by whim or caprice,' " or " 'arrived at through an exercise of will or caprice, without consideration or adjustment with reference to principles, circumstances, or significance, . . . decisive but unreasoned.' " *Goolsby v Detroit*, 419 Mich 651, 678; 358 NW2d 856 (1984) (internal quotation marks and citations omitted). The generally accepted meaning of "capricious" is "apt to change suddenly; freakish; whimsical; humorsome." *Id.* (internal quotation marks and citations omitted). [*Keast, supra* at 424-425.]

This Court ruled in *Cotton*, and later reaffirmed in *Keast*, that the trial court's focus in a hearing conducted pursuant to MCL 710.45 is on the reasons elucidated by the MCI superintendent for withholding consent for the adoption. "It is the absence of any good reason to withhold consent, rather than the presence of good reasons to grant it, that indicates that the decision maker has acted arbitrarily and capriciously." *Keast, supra* at 425, citing *Cotton, supra* at 185. Specifically:

[T]he focus is not whether the representative made the “correct” decision or whether the probate judge would have decided the issue differently than the representative, but whether the representative acted arbitrarily and capriciously in making the decision. Accordingly, the hearing under § 45 is not . . . an opportunity for a petitioner to make a case relative to why the consent should have been granted, but rather is an opportunity to show that the representative acted arbitrarily and capriciously in withholding that consent. It is only after the petitioner has sustained the burden of showing by clear and convincing evidence that the representative acted arbitrarily and capriciously that the proceedings may then proceed to convincing the probate court that it should go ahead and enter a final order of adoption. [*Id.*]

Consistent with the requirements of MCL 710.45, the trial court conducted a hearing and evaluated the following factors identified by the superintendent as comprising good reasons to deny the Porters’ petition:

- **The uncertain marital status of Mr. and Mrs. Porter.** Mr. and Mrs. Porter have not lived together during the entire time that [the minor child] has been placed in the Porter home. Information provided to the agency at various times has indicated that Mr. and Mrs. Porter were planning to divorce. They now report that they plan to remain married and that Mr. Porter will be moving to Michigan.
- **The uncertain and incomplete financial information of Mr. and Mrs. Porter.** The financial information provided to the agency by the Porters raises serious questions about their financial stability. At the present time, it does not appear that they have sufficient household income to continue to support two households. Should Mr. Porter leave his job in California and move to Michigan, it appears that family income would consist entirely of whatever adoption subsidy they receive for their adopted children.
- **The lack of a psychological and parental relationship between Mr. Porter and [the minor child].** Mr. Porter has not been involved in the Porter household as an active member and has not been able to develop a parental relationship with [the minor child]. The explanations offered by Mr. and Mrs. Porter for his continued absence from the home and for his future involvement have not been credible.
- **Delays in progress toward adoption caused by Mr. and Mrs. Porter.** The family has provided incomplete, vague and misleading information about the stability of their household, their financial and marital status, and their employment status. This continuing lack of disclosure has caused an unacceptable delay in permanency planning for [the minor child] since the agency has not been able to approve the family for adoption.
- **The availability of a suitable relative for adoption.** Diane Wesley is a relative to [the minor child] who has been approved by the adoption agency in her

state through ICPC [Interstate Compact for the Placement of Children] for adoption of [the minor child].

- **The presence of a sibling in the adoptive home.** Diane Wesley has adopted a biological sibling of [the minor child]. The benefit to [the minor child] of growing up in the same home with a biological sibling is a significant factor to be considered.

In ruling that the superintendent's decision to withhold consent to adopt was not arbitrary and capricious, the trial court focused on the facts and evidence pertaining to concerns regarding the stability of the Porters' marital status, their extended physical separation and the lack of involvement and establishment of a relationship between Derrick Porter and the minor child, in addition to Derrick Porter's ambivalence and hesitancy regarding the adoption. However, the trial court did not provide blanket approval of the superintendent's stated reasons for denying the petition, having determined that the superintendent's concerns pertaining to the Porters' financial stability did not comprise a good reason to preclude the adoption.

On appeal, the Porters contend that the trial court erred in ruling that MCI's decision to withhold consent for them to adopt the minor child was not arbitrary and capricious, arguing that the trial court failed to correctly apply the legal standard as articulated in *Cotton*. Contrary to appellants' argument, we find that the trial court's application of the standard of review was consistent with *Cotton*. The Porters' mistakenly premise their appellate argument on why the superintendent made the wrong decision. As the trial court correctly noted, the focus of a hearing conducted in accordance with MCL 710.45 is not to determine whether the MCI superintendent made the correct decision or whether the court would have made a different decision, but rather on whether the superintendent elucidated good reasons for withholding consent, which were not arbitrary and capricious. *Id.* The Porters' concede that the presence of a half-sibling in the adoptive home and the lack of a bond between a prospective adoptive parent and the child are good reasons to withhold consent to adopt. Notably, these reasons are among those elucidated by the superintendent for withholding consent for the adoption of the minor child. Accordingly, the decision of MCI's superintendent to withhold consent was not arbitrary and capricious, despite the Porters' disagreement with his conclusions.

In addition, the Porters' contend that the trial court failed to independently analyze the MCI superintendent's reasons for withholding consent for them to adopt the minor child. Based on our review of the record, we find that petitioners' argument is without merit.

Affirmed.

/s/ Michael J. Talbot
/s/ Kurtis T. Wilder
/s/ Michael J. Kelly